STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED August 26, 2014
v	No. 309425 Wayne Circuit Court
MICHAEL PAUL ST. CLAIR, Defendant-Appellant.	LC No. 11-009114-FH

AFTER REMAND

Before: BOONSTRA, P.J., and DONOFRIO and BECKERING, JJ.

PER CURIAM.

This case is before this Court after remand to the trial court. We remanded this case for an evidentiary hearing to determine whether the prosecutor had exercised due diligence in attempting to secure the presence at trial of witness Ashley Luthe.[1] The trial court had determined at trial that the prosecution had exercised due diligence, and it therefore denied defendant's motion for a missing witness instruction. However, the trial court made its due diligence determination at that time without the benefit of any testimony regarding the efforts that had been made, and we accordingly remanded for the taking of testimony. On remand, the trial court held an evidentiary hearing, credited the police officer witnesses' testimony regarding the efforts that had been made to secure the Luthe's presence at trial, and expressly found no fault with the conduct of the prosecution or the police officers involved. Nonetheless, the trial court appeared to find a lack of due diligence based solely on the trial court's own failure to hold a due diligence hearing at the time of trial, and suggested that a new trial may be required. We affirm defendant's conviction and sentence.

I. PROCEEDINGS ON REMAND

On remand, the trial court held a due diligence hearing. Testimony was taken from Brownstown police officer Paul Lazar and Detective Lieutenant Robert Grant, the officer in

[1] *People v St. Clair*, unpublished opinion per curiam of the Court of Appeals, issued December 19, 2013 (Docket No. 309425).

charge. Lazar testified that he and Grant went to find Luthe and located her at 7401 Beech Daly in Taylor, Michigan, where Luthe was apparently staying with her grandmother. Lazar indicated that they "made several stops to that address knowing that a trial was coming." Lazar spoke with Luthe in person twice at that location: once before January 27, 2012, and once at 3:15 p.m. on January 27, 2012 "to confirm that she had her subpoena and knew of the trial that was scheduled." Lazar believed he may have been there on a third occasion, prior to the other two, when just Luthe's grandmother was there. Lazar gave Luthe a subpoena on January 27, and Luthe indicated that she knew the court date was coming and that she would come to court. Lazar believed that Luthe had already received a subpoena in the mail from the prosecutor's office so that he did not have to explain what the subpoena was when he gave it to her because "she already knew." At that time, he had no concern whatsoever that Luthe would not show up for court on January 30. Lazar testified that he had reviewed a subpoena and some sticky notes that were on it from the police file prior to providing his testimony. Lazar knew that they had spoken to Luthe regarding the case, and that "she was developed as a witness somehow," but he did not know what an endorsed witness was. Lazar was not at trial because he had not been called, and he was not contacted about Luthe not being present in court. He had no further contact with Luthe after January 27, 2012.

Grant testified that he was the officer in charge on defendant's aggravated stalking case. He agreed that one of his responsibilities was to secure witnesses for the prosecution for trial. He testified he had "a couple different interactions" with Luthe because "she was one of the key witnesses."

Grant originally met with Luthe along with Lazar to take her witness statements. Grant "was made aware that she was actually dating the Defendant when that had occurred or they were seeing each other. And even at that point she indicated to me that she was frightened for [sic] coming forward of the Defendant." Several weeks later, Grant and Lazar went to Luthe's grandmother's house and subpoenaed Luthe. Luthe did not indicate that she was not going to abide by the subpoena; Grant stated that "[s]he appeared cooperative to me but frightened." Grant stated further that he "knew she was frightened, but there was nothing in my mind that I didn't believe she wouldn't have shown up for the trial." He did not speak with her after that, but believed that Luthe knew when and where she was expected to be for trial. A few weeks later, Grant asked Lazar to go by Luthe's residence because "[i]t's kind [of] on his route home" to "make sure she's aware and she's going to be at trial." Grant was not present during Lazar's January 27 visit.

Grant testified that he had not reviewed the case file and was testifying from memory. He described an endorsed witness as someone "[e]ndorsed through the Prosecutor's Office to testify at trial" and agreed it meant they had to make sure that person was there. He was out of town and was not called at trial, but he was currently aware that Luthe did not appear on January 30. He did not take part in trying to track Luthe down the day of trial or the following day.

The trial court asked the prosecutor whether there were any efforts made to locate Luthe "on the day of trial or the day in between trial." The prosecutor indicated that she had not been the prosecutor who handled the case, but her review of the file and brief indicated that an adjournment had been requested. She did not know if any efforts were made during the trial.

The prosecutor argued that due diligence had been satisfied. She argued that "[t]here is nothing further that can be done when a witness has been personally served and a witness says to the person serving them and in case that's police personnel that she would be present. . . . There are no other further efforts that need to be made on behalf of the prosecution."

Defense counsel stated his concerns as follows:

> What this record now is absent of is any effort by the prosecutor or the police department to go and secure Ms. Luthe for her testimony. Because once . . . the parties realized and the prosecutor in this case on January 30th, the morning of January 30th, 2012 that the endorsed witness Ms. Luthe was not there, to be incumbent to go track her down.
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> And I do trial work as well. We know that happens all the time. The OIC touches base with other officers and they go and track these people down. So there's really no indication of what was done once trial started to secure Ms. Luthe's presence. So clearly there was [sic] due diligence.
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> If the Court—let me back up. If the Court's finding you know sort of step one that the prosecutor and the police exercised due diligence by personally serving Ms. Luthe prior to trial, the due diligence has certainly not been satisfied once trial started and Ms. Luthe was not there.
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> . . . The Court issues a warrant. There should have been due diligence to then go find her and track her down to produce her for trial that day. And certainly the Court knows that trial was concluded the next day. There was a result on January 31st. So they would have had all of January 30th during the day as well as after court hours and at night and early morning hours of the 31st to track Ms. Luthe down. So in that regard, I don't believe due diligence has been satisfied and the jury instruction for that should have been given.

The prosecution responded that it understood the issue before the trial court to be

> whether or not there was due diligence and the Court of Appeals remanded this back to Your Honor for Your Honor to have a Due Diligence Hearing based on representations made by the assistant prosecutor who was handling the case . . . . What was done to secure this witness and specifically named was Detective Lazar. There was nothing that I recall in that Order and now we're going to have to talk about then what did the prosecution try to do throughout the whole trial to continue to obtain this witness. That to me is something new that has not been ordered by the Court of Appeals.

The trial court held:

> If the prosecutor fails to produce any endorsed witness [it] may show that the witness could not be produced despite the exercise of due diligence. . . . If the trial court finds a lack of due diligence, the jury should be instructed that it may

infer that the missing witness's testimony would have been unfavorable to the prosecution's case.

So the Court of Appeals remanded this case for this court to determine whether due diligence was exercised and that's the appropriateness of a missing witness instruction.

The test for due diligence is reasonable and depends upon the facts of the case. . . whether due diligence, good faith efforts were made to procure the testimony, not whether more stringent interference would have produced it.

. . . The Court credits [Lazar's] testimony that he made several steps to first find the witness and then he had at least two contacts with her. One prior, at least one or two prior to the 27th, and on the 27th he indicated that he actually subpoenaed her, that he gave it to her and that she understood it. . . . So again, the Court credits his testimony.

The Court also credits the testimony [of] Lieutenant Grant, the officer in charge, who indicated that he received the case in the fall. . . . [H]e also indicated two weeks prior to the trial date that he personally served her.

He indicated that she indicated that she was frightened, but that she would still come forward. Right before trial he indicated that he—I believe it was on the 27th, he asked Detective Lazar to I guess just make sure that everything was still copacetic and that she was still coming.

He also indicated that the trial date was explained to her. On cross-examination he indicated that he did not review the file. This is from his memory. And again, as the Court indicated, I credit his testimony.

I don't have issues with what the officers or prosecutor did with the case. I think they w[ere] totally appropriate. My issue, however, if what the Court did in terms of when I reviewed the file. I should have asked—I should have either in hindsight either given the nature of this witness's testimony, and the Court of Appeals has pointed out that she might have changed it, but I should have at a minimum I believe given the People an adjournment to find or at least have a hearing on, for example, that night in between the day of the trial that someone drive by, and I'm going back to the Eco's case in terms of due diligence.

There was no chance for the People or the police officers to think that she was not coming before trial. So, again, I'm not faulting them at all in this. But once it was determined that she did not show up, the Court should have asked the officer, not the Prosecutor what efforts did they make to look for her then. And that could have been easy from some of the things that they indicated.

A phone call, if a phone call was made; did they drive by her house; did they check the jails, the County records to see or hospital to see if maybe she was there. That was not done. And since that was not done, the Court is granting the

motion. And, again, I don't fault the Prosecutor's office or the police department. It was my fault for not—because I made—I did go and check myself, but I should have put back on the record what—that I should have not just taken the prosecutor's word for it. I should have put the officer who was working the trial and ask them what they did. And since the record is void of that, the Court is remanding the case, I guess for a new trial if the People choose to do that.

II. STANDARD OF REVIEW

As we stated in our previous opinion:

> This Court reviews a trial court's determination of due diligence and the appropriateness of a "missing witness" instruction for an abuse of discretion. *People v Eccles*, 260 Mich App 379, 388-389; 677 NW2d 76 (2004). Absent clear error, a finding regarding due diligence in producing a witness is a factual finding that will not be set aside on appeal. *People v Briseno*, 211 Mich App 11, 14; 535 NW2d 559 (1995). A finding is considered clearly erroneous "if, after a review of the entire record, the appellate court is left with a definite and firm conviction that a mistake has been made." *People v McSwain*, 259 Mich App 654, 682; 676 NW2s 236 (2003). [*St. Clair*, unpub op at 7.]

III. ANALYSIS

We remanded this case for the trial court to determine whether the prosecution had failed to exercise due diligence in its attempts to produce Luthe for trial. However, it appears that the trial court lost sight of its role on remand. It credited both officers' testimony and found no fault with either their behavior or that of the prosecution. However, it concluded, based on *its* own failure to give an adjournment or question the officer in court at the trial regarding what steps were taken to locate Luthe, that due diligence was not satisfied. This is clearly erroneous. Due diligence is determined by the actions of the police and prosecution, not the trial court. See *Eccles*, 260 Mich App at 388. A trial court should not assign fault to the prosecution for actions taken by the trial court over which the prosecution has no control. Because the trial court expressly did not fault the prosecution or officers, its finding of a lack of due diligence (based solely on its own conduct) was improper. Further, our remand resolved the trial court's error in failing to hold a due diligence hearing at the time of trial. Thus, contrary to the trial court's conclusion, its failure to hold a hearing at the time of trial cannot be a basis, let alone *the* basis, on which to find that a lack of due diligence.

Further, we find, based on the record that is now in existence, that the prosecution exercised due diligence. We remanded this case because the record was unclear at the time regarding the efforts made to produce Luthe for trial:

> Although the trial court found that the prosecutor, through its officer in charge, exercised due diligence in attempting to produce Luthe at trial, the trial court did not state on the record what efforts the officer had made or its basis for concluding that due diligence was exercised. Nor did the trial court indicate what it had reviewed that had caused it to change its mind on this issue; the trial court

> instead merely indicated that it had had an opportunity to review unspecified caselaw, and that it had also had "an opportunity to review something else," without indicating what that "something else" might have been. Officer Lazar never testified regarding his efforts to locate Luthe; instead the trial court merely stated that it would "take the People at its word that the officer [performed] due diligence, did attempt to locate the witness. . . ."
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> The prosecution's earlier equivocal statement that Lazar could "probably" testify as to his efforts to locate Luthe also does not suffice to satisfy the requirement that the prosecution exercise due diligence in locating an endorsed witness. Here, without a record by the trial court, this Court cannot determine with a definite and firm conviction whether an error has been made. The trial court should have conducted a due diligence hearing on this issue. *Eccles*, 260 Mich App at 389, 677 NW2d 76. For example, in *Eccles* the trial court conducted a due diligence hearing where the officer in charge testified as to his efforts to locate the witness, and was subject to cross-examination. Id.; see also *Bean*, 457 Mich at 393–394. The trial court's failure to take these proofs and make factual findings renders this Court unable to review the trial court's finding that the prosecution exercised due diligence. [*St. Clair*, unpub op at 7.]

The record now contains testimony from Grant and Lazar concerning their efforts to locate Luthe. We conclude that the prosecution's efforts to produce Luthe constituted due diligence, and that the trial court erred in concluding otherwise based upon its belief that it should have granted an adjournment or held a due diligence hearing during trial. Although the trial court stated that it remains unclear whether certain efforts were made to locate her during the trial, such as checking hospitals and jails, the prosecution demonstrated that prior to trial the officers diligently attempted to secure Luthe's presence at trial, including several in-person visits from both Grant and Lazar. "[S]erious pretrial efforts" to insure the production of a witness for trial support a finding of due diligence. See *People v Cummings*, 171 Mich App 577, 586; 430 NW2d 790 (1988). Further, the test for due diligence is "one of reasonableness and depends on the facts of each case" and inquires as to whether "diligent good-faith efforts were made to procure the testimony, not whether more stringent efforts would have produced it." Although in *Eccles*, 260 Mich App at 389-390 the officer in charge did indeed check various hospitals and jails in his efforts to locate an endorsed witness, that witness had been missing for several weeks and efforts to serve him with a subpoena had been unsuccessful. *Eccles* did not establish a bright-line rule that such a search must be conducted in all cases; further, *Eccles* does not stand for the proposition that a trial must be adjourned after it has already begun so that such a search can be conducted. Here, Lazar spoke with Luthe, who had been properly subpoenaed, just three days before trial, and he had no reason to doubt she would appear for trial on January 30. Similarly, Grant testified that he had no reason to doubt that Luthe understood what was expected of her and would appear for trial.

Because we find clear error in the trial court's finding that there was no due diligence based on what it perceived as its failings, rather than failings of the prosecution, and because we hold that the prosecution demonstrated due diligence in attempting to produce Luthe, we further hold that the trial court's denial of defendant's request for a missing witness instruction at trial

was proper, and that on remand the trial court abused its discretion in finding a lack of due diligence (based on its own conduct), and in suggesting that a new trial may be required.

We affirm defendant's conviction and sentence.

/s/ Mark T. Boonstra
/s/ Pat M. Donofrio
/s/ Jane M. Beckering